

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND LEWIS RAUCH,

Defendant-Appellant.

UNPUBLISHED

July 17, 2003

No. 239148

Osceola Circuit Court

LC No. 01-003305-FC

Before: Neff, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of first-degree criminal sexual assault (CSC I), MCL 750.520b(1)(b), following a jury trial. Defendant was sentenced to twenty to seventy years in prison. We affirm.

I

Defendant was convicted of CSC I based on an incident of oral sex with his adopted daughter in September 1995, just before her sixteenth birthday. The victim, whose biological mother is defendant's wife, testified that defendant had engaged her in sexually-oriented activities from the time she was approximately eight-years old until she was sixteen, when he sought to have penile-vaginal sexual intercourse with her and she refused. She testified that the activities included buying her scanty workout clothing and lingerie, and having her dance around the house and assume provocative positions while defendant took Polaroid pictures. She and a friend also testified regarding other, more explicit sexual advances by defendant.

The victim testified that in exchange, defendant bought her gifts and gave her privileges. She testified that one night in September or October of 1995 defendant told her she could go to a school dance if she performed oral sex on him, which she did. The victim did not report her allegations of sexual activity with her father to authorities until January 1999, after she moved out of the family home to live with her boyfriend.

Defendant testified and denied the allegations of the alleged activities. It was defendant's theory that the victim's boyfriend was a controlling person, had a grudge against defendant, and manipulated her into making the false charge against defendant.

II

Defendant argues that there was insufficient evidence to convict him of CSC I because the required element of age under MCL 750.520b(1)(b) was not established. Defendant contends that the victim was unable to establish her age at the time of the alleged act, and that the date of the alleged act was established after the prosecutor's improper communication with the victim after the first day of trial. We disagree.

In reviewing a claim of insufficient evidence, this Court views the evidence de novo in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). However, this Court will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 478, amended 441 Mich 1201 (1992). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

On the first day of trial, the victim testified unequivocally that the incident at issue occurred at the end of September or early October 1995. There was no dispute that the incident occurred on the night of a school dance that the victim attended. The victim stated that it could have been homecoming, although she did not know the specific date. She further testified that she went to the dance with two school friends. During cross-examination, in response to defense counsel's questions about her preliminary examination testimony that the incident occurred when she was "about sixteen," the victim explained that she believed she was about to turn sixteen and was fifteen. Defense counsel asked her if it was a possibility that she could have been sixteen, and she responded that it was a possibility.

On the second day of trial, the victim again unequivocally testified that the incident occurred at the end of September or in early October 1995, stating that her sixteenth birthday was November 13, 1995. She stated that she considered that "about sixteen."

Although the victim's testimony was more definitive concerning her age and the specific dance on the second day of trial,¹ and she stated that she had talked with the prosecutor about the case the previous night, her testimony that the incident occurred at the end of September or early October 1995 was unchanged. Further, there was testimony from other witnesses establishing that the dance at issue was before the victim's sixteenth birthday. One of the friends that attended the dance with the victim,² testified that she recalled the dance, which was the

¹ For example, in response to the prosecutor's specific question whether she was absolutely sure this occurred before her sixteenth birthday, she answered "yes."

² This friend was the same friend involved in the alleged sexual activities.

homecoming dance, and it was at the end of September or the beginning of October. The investigating officer testified that she contacted the school and obtained the date of the homecoming dance, which was September 23, 1995. Whether the victim's testimony of the date of the dance and her age was credible was a matter for the jury. *Id.*; *Wolfe, supra*. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence of the element of age.

III

Defendant next argues that the court erred in denying his motion for a new trial because the jury's verdict was against the great weight of the evidence. Defendant's argument is based on the same contentions concerning the victim's age as his insufficiency claim, *supra*. Defendant contends that the court should consider "the totality of the evidence throughout the trial, including the evidence of the [victim's] age and the issues surrounding it, and thereby evaluate the credibility of the whole case in that light." He contends that the victim's lack of credibility on the age question, in what is essentially a one-on-one credibility contest regarding the alleged sexual act, casts doubt on her general credibility. Thus, weighing the victim's lack of credibility, the prosecutor's intervention, and the influence of the victim's boyfriend, against the positive testimony for defendant, the verdict must not stand. We find this claim without merit.

We review the trial court's grant or denial of a motion for new trial for abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993), overruled in part on other grounds in *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). Given the evidence discussed *supra*, we conclude that the question of the victim's age was for the jury to decide.

Further, absent exceptional circumstances, conflicting testimony or a question as to the credibility of a witness is an insufficient basis for granting a new trial. *Id.* at 642-643. No such circumstances existed here. The alleged extraneous influences and the discrepancies in testimony do not preponderate so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand. *Id.* at 627. The overall credibility determinations in this case were matters for the jury to decide.

IV

Defendant claims that he was denied due process and his right to a fair trial by the prosecutor's misconduct during the trial. Defendant alleges error in the prosecutor's communication with the victim after the first day of trial, which changed the victim's testimony. Defendant also contends that the prosecutor distorted the facts and argued facts not in evidence during closing argument. We find no error requiring reversal.

Because defendant did not object to the challenged conduct during trial on the ground alleged on appeal, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To the extent that defendant alleges error in the denial of his motion for a new trial on the ground of prosecutorial misconduct, we consider whether the denial was an abuse of discretion. *Herbert, supra*.

First, defendant has not demonstrated plain error in the prosecutor's communication with the victim after the first day of trial.³ Further, defendant has failed to show that he was prejudiced. As noted *supra*, the victim's essential testimony that the sexual act at issue occurred at the end of September or in early October was unchanged. Any other alleged change in her testimony, such as the level of certainty of her age and the dance, was a matter of credibility to be weighed by the jury, particularly given the supporting testimony of other witnesses. Accordingly, appellate relief is not warranted. *Carines, supra* at 763-764.

Second, with regard to the prosecutor's closing argument, we also find no error requiring reversal. Defendant asserts that the prosecutor's argument concerning the specific date of the incident as September 23, 1995, was without evidentiary support. We disagree. As noted, evidence established the dance at issue could have been the homecoming dance, which the investigating officer testified took place on September 23, 1995. Given the testimony of the victim and her friend, and the investigating officer, the prosecutor's argument was not improper. We find no plain error that affected defendant's substantial rights. *Carines, supra*. The trial court did not abuse its discretion in denying defendant's motion for a new trial.

V

Defendant claims that he was denied due process and a fair trial by the admission of other acts evidence contrary to MRE 404(b)(1), and by the lack of notice concerning the evidence, contrary to MRE 404(b)(2). We disagree.

Under MRE 404(b)(1),⁴ evidence of other crimes, wrongs, or acts may be admissible to show motive, opportunity, intent, preparation, scheme, plan, system, knowledge, identity, or absence of mistake or accident. Defendant correctly argues that MRE 404(b)(2) requires the prosecution to provide advance notice of its intent to use such evidence:

The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial

³ Defendant has failed to cite any authority for his contention. An appellant may not merely assert an error and leave it to this Court to search for authority to sustain or reject his position. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984); *Kelly, supra* at 640-641.

⁴ MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

The prosecutor apparently did not provide written notice pursuant to MRE 404(b)(2), but argued that notice was not required under the circumstances of this case, and further, that defendant had notice because the testimony at issue was presented at defendant's preliminary examination. Defense counsel admitted that he was aware of the evidence, but denied that he knew the prosecutor intended to use the evidence.

The trial court noted that defendant's motion to exclude the evidence pursuant to MRE 404(b), filed on the morning of trial, was not timely. The court concluded that there was good cause to excuse the notice requirement where defendant was aware of the evidence. Pre-trial notice can be excused if good cause is shown. MRE 404(b)(2). Moreover, the rule requires advance notice, but does not prescribe the form of that notice. We find no error. Even if there was error concerning notice, we conclude that it was harmless, particularly given the trial court's pretrial consideration of defendant's objection to the other acts evidence. *People v Hawkins*, 245 Mich App 439, 453-456; 628 NW2d 105 (2001).

Defendant further argues that the court erred in admitting evidence of sexual activities before the incident at issue, particularly the testimony of the victim's friend. Defendant argues that the evidence was not offered for a proper purpose under MRE 404(b) and was irrelevant, and that its probative value was substantially outweighed by the danger of unfair prejudice, MRE 403.

This Court reviews a trial court's decision to admit evidence for abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). We find no abuse of discretion.

To be admissible under MRE 404(b), bad acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Starr, supra* at 496; *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

A "proper purpose" under MRE 404(b) is one other than a character to conduct theory, i.e., other than showing "defendant's inclination to wrongdoing in general to prove that the defendant committed the conduct in question." *VanderVliet, supra* at 63, 74. Generally, "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *VanderVliet, supra* at 60. Evidence of sexual misconduct perpetrated by a defendant on the victim may be relevant for the purpose of corroborating the victim's testimony. *People v Sabin (After Remand)*, 463 Mich 43, 70; 614 NW2d 888 (2000).

Further, other similar misconduct may be logically relevant where the other acts and the charged offense are “sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.” *Id.* at 63.

Here, the challenged other acts evidence primarily involves sexually-oriented activity between defendant and the victim, sometimes while her friend was present, over a period of several years. This includes dressing up in sexy clothing, dancing and posing in sexually provocative positions, and some instances in which defendant attempted to more directly involve the victim in sexual activity, such as getting into the shower or bed naked with the victim. Defendant also objects to evidence that he provided the girls alcohol.

Defendant’s argument that these acts were too remote in time and too dissimilar to the charged acts to be relevant is unsupported by Michigan caselaw. See *id.* at 66-67 (repeated acts of oral sex performed on stepdaughter relevant to show common scheme or plan for single instance of sexual intercourse with daughter); *People v Knapp*, 244 Mich App 361, 366, 379-380; 624 NW2d 227 (2001) (evidence of criminal sexual conduct in 1976 was relevant to prove a common scheme or plan for a similar incident in 1997). Further, there was a common basis underlying the activity in this case, i.e., that defendant provided gifts and privileges in exchange for compliance.

Defendant further argues that the probative value of the challenged evidence was substantially outweighed by the danger of unfair prejudice and should have been excluded because the “barrage of claims” permitted by the court was extraneous to the charged fellatio. Defendant contends that the friend’s testimony was “removed” from the actual sexual acts and much of the victim’s testimony confused matters of clothing, gifts, money, all part of normal family relationships, with her claims of sexual acts.

Contrary to defendant’s claim, the girls’ testimony was highly probative of a continuing course of conduct by defendant, given his general denial of the allegations and his theory that the victim was manipulated by her boyfriend into making a false allegation of oral sex. We find no abuse of discretion in the determination that the probative value of the evidence was not substantially outweighed by the danger of undue prejudice. The MRE 403 determination is best left to a contemporaneous assessment of the presentation, credibility and effect of the testimony. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). Further, a court’s decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Sabin, supra* at 67.

VI

Defendant argues that his twenty- to seventy-year sentence is disproportionate.⁵ A sentence must be proportionate to the circumstances of the offense and the offender. *People v*

⁵ The offense of which defendant was convicted was committed in 1995, and therefore the judicial sentencing guidelines apply. *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

Milbourn, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990); *People v Bennett*, 241 Mich App 511, 515; 616 NW2d 703 (2000). Defendant contends that his positive personal, family, and community history requires a finding that his sentence, at the top of the guideline score, was error.

Under the judicial sentencing guidelines, defendant's recommended minimum sentence range was eight to twenty years. A sentence imposed within an applicable judicial sentencing guidelines range is presumptively proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Defendant presented no unusual circumstances before the trial court to conclude that his sentence, within the guidelines range, nevertheless violated the principles of proportionality. *Milbourn, supra* at 661; *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). A defendant's employment, lack of criminal history and minimum culpability are not unusual circumstances that overcome the presumption of proportionality. *Daniel, supra*. Therefore, the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Janet T. Neff
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello